86-1442

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JOHN DOE,
Cross-Petitioner

v.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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March 9, 1987

QUESTION PRESENTED

Whether an employee of the Central Intelligence Agency who has been discharged on the ground that his homosexuality creates a security risk is entitled to a statement of reasons for the Agency's determination, where there has been no claim or showing that disclosure of the reasons would compromise security.

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In the event the Court grants the petition in *Gates* v. *Doe*, No. 86-1294, cross-petitioner John Doe petitions for a writ of certiorari to review portions of the judgment of the United States Court of Appeals for the District of Columbia Circuit that are adverse to him.

OPINIONS BELOW

The opinion of the court of appeals (App.[1] 1a-55a) is reported at 796 F.2d 1508. The opinion of the district court (App. 59a-78a) is reported at 601 F. Supp. 581.

JURISDICTION

The judgment of the court of appeals (App. 79a-80a) was entered on August 1, 1986. A timely petition for rehearing was denied on October 9, 1986. (App. 81a.)

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[1] "App." refers to the appendix to the petition for certiorari in No. 86-1294.

The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 6, 1987, and the petition in No. 86-1294 was filed and served on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In No. 86-1294, the government contends that the court of appeals erred in holding that the decision of the Director of Central Intelligence to discharge cross-petitioner Doe is judicially reviewable. In this cross-petition, Doe submits that the court of appeals rendered the right to review meaningless by holding that Doe was not entitled to know the reasons for the Director's decision.

A. Background

The petition in No. 86-1294 contains a statement of the factual background that, while generally adequate, requires elaboration in two respects. First, it is undisputed that (1) Doe is not embarrassed or ashamed about his homosexuality; (2) his family, friends, and some of his neighbors are aware of his sexual orientation; (3) his homosexuality has never disrupted or adversely affected the performance of his duties with the CIA; and (4) he has not disclosed any classified information to any sexual partner or to any other unauthorized person, a fact that was confirmed by the CIA's polygraph examination of Doe. (App. 4a, 61a-62a.)

Second, the government's statement omits material aspects of the proceedings that preceded Doe's discharge. Following extensive interviews with Doe concerning his homosexuality and possible security violations, a CIA polygraph officer prepared a five-page factual report. Doe was permitted to review this report and submit a two-page addendum. (App. 4a) Security officers then told Doe that they would prepare an "adjudication" of his case on the basis of the factual report and would forward both documents to the Director of Security.

(App. 4a, 62a.) Three weeks later, a security officer informed Doe that the Office of Security had determined that "the circumstances of his homosexuality posed a security threat." (App. 4a). When Doe asked for the reasons for this determination, the security officer refused to explain. (App. 4a, 62a.)

Doe was asked to resign, but refused. (App. 4a.) The Office of Security then recommended to the Director of Central Intelligence that Doe's employment be terminated. (*Id.*) Through counsel, Doe was permitted to submit a statement to the Director. However, the Agency refused to allow access to the "adjudication," and therefore Doe was unable to respond to that document. (App. 4a-5a, 62a.)

Subsequently, the Agency's Deputy General Counsel informed Doe's counsel by letter that the Director had "deemed it necessary and advisable in the interests of the United States to terminate your client's employment with this Agency." (App. 5a.) That letter also stated that "[t]he Director has reviewed the facts of your client's case, your client's memorandum commenting upon those facts, the Office of Security's evaluation of the security significance of those facts, and the statement submitted by you in your client's behalf." (*Id.*) Since Doe was the sole source of the facts reviewed by the Agency, determination of his case did not involve information provided by confidential sources. Moreover, the CIA never asserted that the "adjudication" could not be disclosed for reasons of security.

B. The Nature of Doe's Claims

In his complaint, Doe sought an order requiring the CIA to reconsider his security suitability under minimally fair procedures that would provide him with (1) an explanation of why the Agency had determined that the circumstances of his homosexuality pose a security threat and (2) an opportunity to respond. (App. 60a.) Doe identified three bases for this claim to fair proce-

dures: CIA regulations, the Administrative Procedure Act, and the Fifth Amendment.

CIA Headquarters Regulation 20-27m provides that "[n]ormally, separations by the Agency will be effected in accordance with the procedures" contained in the regulation. (App. 19a-20a.) These procedures require the Agency to notify the employee of the reasons why separation is being recommended and to give the employee an opportunity to comment orally or in writing. (App. 71a.) Where circumstances "make these procedures impractical or undesirable, . . . the case should be handled in a manner conforming to the circumstances." (App. 20a.) The regulations also provide that "any employee may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States." (*Id.*)

Doe contended that under both the Administrative Procedure Act and the Fifth Amendment he had the right to be notified of the reasons why his homosexuality had been deemed to present a security risk and to respond to these reasons. Doe's Fifth Amendment claim rested on his contention that the Director's decision had deprived him of (1) a liberty interest by stigmatizing him as a security threat, and (2) a property interest in continued employment. With respect to this property interest, Doe argued that section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), CIA regulations, and Agency policy statements gave him a reasonable expectation of continued employment as long as his services were needed, he performed his job well, and he protected classified information from unauthorized disclosure.

C. The Rulings Below

The district court ruled that CIA regulations required the Agency to give Doe (1) an explanation for its conclusion that the circumstances of his homosexuality pre-

sented a security risk and (2) an opportunity to respond. (App. 71a-74a.) The district court did not address either prong of Doe's Fifth Amendment claim or his APA claim.

On appeal, the CIA did not contest the proposition that a federal court can require the Agency to follow its own regulations; instead, it argued that the district court misconstrued what the CIA's regulations require. Nor did the CIA argue that judicial review of Doe's constitutional claim was precluded; in this regard, the Agency contended only that no property or liberty interests were burdened by the Director's action. The Agency's argument concerning the preclusion of judicial review was directed only at Doe's efforts to obtain review under the Administrative Procedure Act.

The court of appeals agreed with the government that the district court had misconstrued the CIA's regulations and held that those regulations provide no independent source of procedural or substantive protections. (App. 19a-23a.) The court, however, rejected the Agency's contention that APA review was precluded by section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c). (App. 7a-19a.) It then proceeded to review Doe's termination under the APA to determine whether the Director's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). (App. 23a-24a.)

Purporting to apply that standard, the court of appeals concluded that Doe was not entitled to a statement of reasons. Adverting to "the sensitive nature of the CIA's mission," the court stated that it "must operate under a presumption that the CIA is acting lawfully and in good faith in any invocation of section 102(c), unless the plaintiff gives adequate reason to believe otherwise." (App. 26a.) "Only if a plaintiff offers a basis for suspicion that the Director terminated the plaintiff's em-

ployment for an impermissible reason will we require the Director to justify his or her decision." (*Id.*)[2]

The court of appeals never addressed Doe's claim that he had a property interest in continued employment, of which he cannot be deprived without due process. But the court did agree that the Director's determination deprived Doe of a liberty interest in his reputation. (App. 28a-30a.) Nonetheless, the court held that the requirements of due process had been satisfied because "Doe was given a meaningful opportunity to contest any allegation that his homosexuality presented a security risk," and "[i]n the context of a very sensitive agency such as the CIA, we cannot say that the Constitution requires more." (App. 31a-32a.) In reaching this conclusion, the court did not mention that Doe was never told why the Agency reached its determination that his homosexuality posed a security risk.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning whether firmly established procedural protections should be diluted or withdrawn altogether in the face of perceived dangers to the national security, where the government has not made even a preliminary claim or showing that such dangers actually exist. For many years, it has been an accepted principle of both administrative law and due process jurisprudence that a person adversely affected by an agency's determination has a right to know the reasons for that determination and to have an opportunity to respond. The court of appeals turned this principle on its head and placed on cross-

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[2] The court of appeals remanded the case for further consideration of whether the CIA has a policy barring employment on the basis of homosexual orientation rather than homosexual conduct. (App. 27a.) The court stated that if the Agency's prohibition was based on homosexual orientation rather than conduct, Doe has an arguable constitutional claim to litigate. (*Id.*)

petitioner Doe the burden of showing that the Agency's determination was improper before the agency would be required to explain its reasons.

To be sure, there may be some cases where an agency such as the CIA cannot disclose its reasons for terminating an employee. However, there are established, workable procedures for separating those cases from cases where, as here, there has been no assertion that national security would be endangered by providing the aggrieved person with the reasons for the Agency's action.

The decision of the court of appeals warrants review for two reasons. First, it jeopardizes the rights of thousands of federal employees, not only at the CIA, but also at other government agencies that could assert, under the decision below, that considerations of national security require departure from well-recognized procedural protections. Second, this case offers an opportunity for the Court to affirm that the rule of law applies to the government's national security agencies and that traditional notions of procedural regularity need not be abandoned at the mere invocation of the phrase "national security."

The critical defect in the CIA's handling of Doe's case was its refusal to provide him with the evaluation prepared by the Office of Security that set forth the reasons why the circumstances of his homosexuality presented a security threat. Although Doe was given an opportunity to appeal to the Director from the Office of Security's recommendation that Doe be terminated, that opportunity was meaningless without access to the evaluation. Without this document, Doe was unable to know whether the adverse determination about his homosexuality was based on some misunderstanding of the facts of his case or on an irrational bias toward homosexuals. Without this document, Doe's appeal to the Director was a blind shot in the dark.

The CIA never asserted that the Office of Security's adjudication was withheld for reasons of confidentiality or secrecy; the refusal rests solely on the exercise of an unexplained prerogative. Furthermore, the letter from the CIA's Deputy General Counsel makes clear that Doe himself was the sole source of all the facts on which the evaluation was based. (App. 5a.) Thus, there is no discernible reason why considerations of confidentiality or sensitivity—even if asserted—should prevent Doe from having access to the evaluation.

1. The due process clause of the Fifth Amendment, the Administrative Procedure Act, and the CIA's regulations entitle Doe to an explanation of the Agency's determination that the circumstances of his homosexuality present a security threat.

a. This Court recently held that when a government agency proposes to fire a public employee who has a property interest in continued employment, the Fifth Amendment entitles him "to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546 (1985). Here, the court of appeals held that Doe may have had a liberty interest in clearing his name. (App. 28a-30a.) This should have led the court to conclude that Doe is entitled to the same procedural protections afforded in *Loudermill*. The court nevertheless exempted the CIA from providing any explanation of its position.

b. Apart from the Fifth Amendment, the Court has frequently emphasized that, as a matter of administrative procedure, a person subject to an informal agency adjudication is entitled to know the reasons for the agency's proposed action. *E.g.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 571-72 (1975). *See* 5 U.S.C. § 555(e). In this context, the Court has long recognized the impor-

tance of permitting access to agency documents such as the Office of Security's evaluation of Doe's case.

In *Gonzalez* v. *United States*, 348 U.S. 407 (1955), the Court held that where an applicant for conscientious objector status was entitled to a hearing on his application, he was also entitled to review and respond to the Department of Justice's recommendation to the Selective Service Appeal Board. The Court reasoned that "if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as the overall position of the Department of Justice." *Id.* at 413. Accordingly, the Court held that "the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." *Id.* at 415. As the Court pointed out in a companion case to *Gonzalez*, an opportunity to appeal an administrative decision cannot be "conducted on the level of a game of blindman's buff" and still satisfy "basic fairness." *Simmons* v. *United States*, 348 U.S. 397, 405 (1955).

These principles in turn were drawn from one of the Court's seminal cases on administrative law. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). Without this opportunity, "the right may be but a barren one." *Id.* Doe's opportunities for review were rendered barren twice: first when pursuing the Agency's offer to appeal to the Director, he was denied access to the Office of Security's "adjudication;" and again when the court of appeals held that that Doe had a right to judicial review under the APA, but no right to know the reasons for the Director's decision.

c. The CIA's own regulations provide that "normally" an employee will be informed of the reasons why he is recommended for termination. (App. 19a, 71a-72a.) Although the regulations also permit the Agency to discharge employees immediately without regard to these procedures when the circumstances of the case make them "impractical or undesirable" (*id.*), the CIA did not invoke this exception. Indeed, the district court found that exigent circumstances were not present in this case. (App. 71a.)

2. The court of appeals' extraordinary inversion of proper procedures was based on its concern that requiring a statement of reasons would endanger the national security. (App. 23a-24a, 26a, 32a.) There may be some instances where this is true. However, the danger is not so inevitable nor a remedy so unworkable that the courts are justified in withdrawing the right to a statement of reasons as a matter of course.

As noted above, the CIA's own regulations provide that "normally" its employees will be accorded the procedures Doe seeks. (App. 19a.) These regulations reflect the CIA's judgment that in the bulk of separation cases, the employee can be told the reasons for the Agency's proposed action. In cases where this is not possible, the agency can simply assert that national security considerations prevent it from disclosing the reasons for the proposed termination. This assertion need not be so detailed that it gives away the secrets that must be protected. Indeed, in cases involving the state secrets privilege and the national security exemption to the Freedom of Information Act, the lower courts have recognized that there are situations where government agencies cannot appropriately be required to explain their actions. *E.g.*, *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982); *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

In such cases, however, the courts require some minimal statement from a responsible agency official before departing from ordinary procedures. In this case, the CIA never asserted that it would endanger the national security to provide Doe with the Office of Security's evaluation of the alleged risks posed by his homosexuality. Nor did the CIA assert that it would endanger national security even to say that providing Doe with the evaluation would in turn endanger security. In the absence of any such claim or showing, there was no justification for holding that Doe was not entitled to the Agency's reasons.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In No. 86-1294, we filed a petition for a writ of certiorari presenting the question whether the decision of the Director of Central Intelligence to discharge an officer or employee of the Central Intelligence Agency (here, John Doe) pursuant to the Director's authority under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), is judicially reviewable under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701-706. Respondent John Doe has now filed a cross-petition, claiming that the review afforded him by the court of appeals does not go far enough, because he is entitled to a fuller explanation of the reasons for his dismissal (Cross-Pet. 2). Because the cross-petition neither raises a

significant question of federal law nor demonstrates a conflict with the decisions of this Court or among the circuits, review by this Court is not warranted.

1. Doe maintains that he is entitled under the Due Process Clause, the APA, and the CIA's regulations to a statement of the reasons for his dismissal from the CIA. That claim does not warrant review even if the government's petition is granted. The court of appeals remanded this case to the district court precisely because the record did not reveal the Director's reason(s) for dismissing Doe (Pet. App. 25a, 32a). In these circumstances, it is difficult to see how the relief Doe has sought in his cross-petition differs from the relief he has already been awarded under the judgment below. In any event, he is not entitled to further information concerning the reasons for his dismissal.

a. Relying on *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), Doe argues (Cross-Pet. 8) that he was entitled to a statement of the reasons for his discharge from the CIA, since it may affect his liberty interest in obtaining future employment. *Loudermill* ruled that a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before he may be discharged (470 U.S. at 546). Doe was not a "tenured" CIA employee, however,[1] as the court of appeals correctly deter-

[1] Tenure rights are created by "existing rules or understandings" that stem from a source independent from the Due Process Clause, such as a statute, regulation, or contract (*Loudermill*, 470 U.S. at 546; *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). No such authority gave Doe a property right in continued employment with the CIA. The text of

mined,[2] and Doe does not argue to the contrary. Accordingly, Doe's reliance on *Loudermill* is misplaced.

Doe argues that the hearing procedures necessary before a tenured public employee may be discharged also apply when an employee is entitled only to a "name-clearing hearing" (Pet. App. 31a). It is doubtful that Doe has stated a claim that the government has deprived him of a liberty interest by preventing him from obtaining future employment, because his complaint did not allege that the CIA has published any false or defamatory statements in connection with his dismissal, and the failure to do so ordinarily "dooms" a claim like Doe's (*Loudermill*, 470 U.S. at 547 n.13; *Bishop* v. *Wood*, 426 U.S. 341,

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Section 102(c) denies CIA personnel the qualified tenure rights held by other civil service employees under the Lloyd-LaFollette Act (now the Civil Service Reform Act of 1978, 5 U.S.C. 7501); the Agency's regulations reiterate the terms of the statute (CIA Headquarters Reg. §§ 20-27.j, 20-27.m, 20-27.m(8)(c) (Mar. 17, 1977); and Doe has alleged no other source of a property right. Accordingly, since Doe was not deprived of a property right by his discharge, he had no due process right to examine the Office of Security report or to receive a statement of reasons for his dismissal. *Codd* v. *Velger*, 429 U.S. 624, 628 (1977) (when a public employee has no property interest in continued employment, "the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question").

[2] Doe erroneously asserts (Cross-Pet. 6) that the court of appeals never addressed his claim that he had a property interest in continued employment with the CIA. The court ruled that Doe would have no constitutional claim unless the Director dismissed him because of a CIA policy barring the employment of all homosexuals. Pet. App. 23a-28a (discussed at 86-1294 Pet. 7-8). In so ruling, it necessarily rejected Doe's claim that his discharge unlawfully deprived him of a property interest in continued employment with the CIA.

348 (1976)).[3] In any event, "the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide [him] an opportunity to clear his name,'" not to convince his employer that he should be reinstated (*Codd* v. *Velger*, 429 U.S. 624, 627 (1977)). As the court of appeals found (Pet. App. 31a-32a), the procedures afforded Doe gave him "an opportunity to refute the charges and 'clear his name.'" Doe admitted that he was a homosexual; he was given notice that the CIA was concerned that the circumstances of his homosexuality created a security risk;[4] he was given a chance to

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[3] Doe's complaint alleged that the CIA will give him a positive recommendation to any future employer, but that he was told by a CIA security officer and an assistant general counsel that, if he applies for a job requiring a security clearance, the CIA will inform the prospective employer that the CIA determined that Doe is a security risk because of his homosexuality. Amended Complaint paras. 37-38 (C.A. App. 49-50); see also Plaintiff's Statement of Material Facts As To Which There Is No Genuine Dispute paras. 53-54 (C.A. App. 16-17). The court of appeals predicted that, "[a]s a practical matter, Doe will be unable to obtain employment whenever a security clearance is required," because "we find it inconceivable that other agencies [and private employers] would second-guess such a determination by the CIA" (Pet. App. 30a & n.67). But Section 102(c) in terms provides that dismissal does not by itself bar a former CIA employee from obtaining other employment by the federal government (86-1294 Pet. 24). Given the sensitive nature of the CIA's work, there is also no reason to assume, as the court of appeals did, that private employers will automatically follow the CIA's determination. There is no need to resolve these issues in this case, however, since the court of appeals correctly held that the procedures afforded Doe by the CIA were sufficient.

[4] The letter that Doe's counsel submitted to the Director stated that a CIA security officer had told Doe that the CIA

review and to respond to a factual report summarizing his interviews and his polygraph results; and he took advantage of the opportunity to dispel the CIA's concern that he was a security risk in a letter from his counsel to the Director (*id.* at 4a; C.A. App. 26-30). Doe has cited no decision suggesting that a "name-clearing hearing" requires more.

Doe complains (Cross-Pet. 7) that he deserved a fuller explanation of the facts to learn whether the Director's decision "was based on some misunderstanding of the facts of his case or on an irrational bias toward homosexuals." But Doe was aware of the nature of the Office of Security's general concerns, including "his unwillingness to identify his homosexual partners" (C.A. App. 27). Moreover, in an extensive letter to the Director, Doe's counsel addressed his concerns that the Director might misunderstand the facts of his case or harbor an irrational bias towards homosexuals (*id.* at 26-30). Accordingly, Doe had a meaningful opportunity to clear his name, even though the proceedings were informal. Cf. *Hewitt* v. *Helms*, 459 U.S. 460, 472-474 (1983) (prison officials need only conduct "an informal, nonadversary review" of the information supporting administrative confinement).

Doe concedes (Cross-Pet. 10-11) that there are circumstances where the CIA may properly withhold the reasons for dismissing an employee because of national security concerns, but he maintains that the Director should be required to justify such withholding on a case-by-case basis. The court of appeals

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was concerned about "the duration and frequency of Mr. Doe's sexual activity, his failure to reveal his homosexuality to the Agency for six years, and his unwillingness to identify his homosexual partners." C.A. App. 27.

correctly noted (Pet. App. 23a-24a), however, that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), reflects Congress's judgment that the Director must have broad power to remove employees for the slightest security risk, and that even his judgments about whether to withhold information or explain the reasons why he is doing so are entitled to great deference. This judgment by Congress is entitled to deference even on the question whether due process requires disclosure (see *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 (1985)). Congress's judgment is also eminently reasonable. As this Court has recognized, "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency," which has "both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details." *CIA* v. *Sims*, 471 U.S. 159, 178-179 (1985). These considerations are relevant in determining the process that is due under the Fifth Amendment. See *Haig* v. *Agee*, 453 U.S. 280, 309 (1981); *Cole* v. *Young*, 351 U.S. 536, 546-547 (1956). It was thus hardly unreasonable for the court of appeals to limit the disclosures necessary for a proceeding whose sole purpose is to allow an employee to clear his name.

b. Doe also contends (Cross-Pet. 8-9) that he has a right under 5 U.S.C. 555(e) to a statement of the reasons for his dismissal.[5] More specifically, he

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[5] Section 555(e) of Title 5 provides:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other re-

claims a right under Section 555(e) to a copy of the CIA Office of Security report to the Director, but having made no such claim in the lower courts he may not do so now. In any event, Doe's argument under Section 555(e) is insubstantial.[6]

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quest of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

[6] As we have explained in the petition (86-1294 Pet. 12-22), the Director's decision to dismiss a CIA employee under Section 102(c) is not subject to review under the APA. Doe therefore is not entitled under 5 U.S.C. 555(e) to a statement of the reasons why he was discharged. *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1101-1102 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (the government is not required by 5 U.S.C. 555(e) to provide a statement of reasons for an employee's dismissal when the decision to discharge him is "committed to agency discretion by law" under 5 U.S.C. 701(a)(2)).

But Section 102(c) shows that Doe's claim lacks merit even if the Director's decision to dismiss him may be reviewed under the APA. As we explained in the petition (at 14-15), Section 102(c), which was adopted the year after the enactment of the APA, denies CIA personnel the rights that Doe seeks, because it provides that the Director's authority to remove a CIA employee is exempt from the civil service laws, which would otherwise have guaranteed Doe notice of any charges and a statement of reasons for his removal. It would be anomalous to find that 5 U.S.C. 555(e) guarantees CIA personnel the same rights explicitly withheld from them under a statute that is specifically addressed to the rights of Agency employees, Section 102(c). Accordingly, 5 U.S.C. 555(e) cannot be read to require the Director to provide a statement of reasons why he invoked his authority under Section 102(c) to remove a CIA employee, even if the merits

Section 555(e) applies only to an "agency proceeding," and an "agency proceeding" includes only "rule-making," "adjudication," or "licensing" procedures (5 U.S.C. 551(5), (7), (9), and (12)). While the termination of an employee might conceivably be argued to involve an adjudication, it is clear from the statute that the APA hearing procedures do not apply to disputes regarding the "selection or tenure of an employee." 5 U.S.C. 554(a)(2); Senate Comm. on the Judiciary, *Administrative Procedure Act: Legislative History*, S. Doc. 248, 79th Cong., 2d Sess. 202, 260-261 (1946); *Normile* v. *McFague*, 685 F.2d 9, 10 n.2 (1st Cir. 1982) (5 U.S.C. 555(e) is inapplicable to the dismissal of a federal employee); *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1101-1102 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (5 U.S.C. 555(e) does not entitle a federal employee to a statement of the reasons for his removal); *King* v. *Hampton*, 451 F.2d 247, 249 (8th Cir.), aff'g 327 F. Supp. 714, 716 (E.D. Mo. 1971); see *Zeisel* v. *Pierce*, 784 F.2d 405, 408 (D.C. Cir. 1986) (dismissal of an employee is a matter involving "tenure" under 5 U.S.C. 554(a)(2)); *Olsen* v. *Department of Commerce*, 735 F.2d 558, 562 (Fed. Cir. 1984) ("[t]he discharge of an employee involves his 'tenure'" under 5 U.S.C. 554(a)(2)); *Hoska* v. *Department of the Army*, 694 F.2d 270, 273 (D.C. Cir. 1982).[7] Accordingly, Doe

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of the Director's decision can itself be reviewed under the APA.

For the reasons given in the text, however, Doe's claim lacks merit even if our construction of Section 102(c) is erroneous.

[7] None of the cases cited by Doe is to the contrary. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), on which Doe relies

had no right under 5 U.S.C. 555(e) to a statement of reasons from the Director explaining his actions.

c. Finally, Doe argues (Cross-Pet. 10) that the CIA's regulations entitle him to know why he was dismissed and to examine the Office of Security report, but that claim is frivolous. The pertinent regulation expressly preserves the Director's discretion under Section 102(c) to remove an employee summarily without issuing a statement of reasons. CIA Headquarters Reg. §§ 20-27.j, 20-27.m, 20-27.m(8)(c) (Mar. 17, 1977) (reprinted in relevant part at Pet. App. 19a-20a).[8] As the court of appeals succinctly

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(Cross-Pet. 8), does not support his claim. *Dunlop* found insufficient the Secretary of Labor's statement of reasons for refusing to file an action to set aside a labor union election, on the ground that the statement did not satisfy the requirements of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(a) and (b) (421 U.S. at 573-574). That statute is not at issue in this case, and, in contrast to it, the relevant statute, Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), certainly does not expressly or impliedly require a statement of reasons for an employee's removal.

Doe's reliance (Cross-Pet. 9) on *Simmons* v. *United States*, 348 U.S. 397 (1955), and *Gonzalez* v. *United States*, 348 U.S. 407 (1955), is also misplaced. Neither case involved 5 U.S.C. 555(e). Instead, those cases dealt with the requirements of an entirely different statute, Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. (Supp. II 1948) 456(j), which required a hearing on "'the character and good faith'" of a claim of conscientious objector status (*Simmons*, 348 U.S. at 403 (quoting statute)). In this case, the relevant statute, Section 102(c), does not require the Director to find any facts or to conduct a hearing before an employee may be removed.

[8] Doe argues (Cross-Pet. 10) that the Director's authority is limited by the Agency's regulations to those circumstances

put it (Pet. App. 20a), "[w]e cannot imagine how the CIA could have more plainly expressed its intent to protect the discretion granted it by section 102 (c)."

2. Doe asserts (Cross-Pet. 7) that the court of appeals' decision threatens "thousands of federal employees," who, he contends, may be summarily removed under that decision by "the mere invocation of the phrase 'national security.'" Doe has clearly exaggerated the effect of the court of appeals' decision on federal employees.

The court of appeals emphasized that judicial review is limited because of the broad discretion vested in the Director to remove CIA personnel under Section 102(c) and because the sensitive nature of the CIA's functions and the national security interests at stake dictate that judicial oversight of the Director's removal decisions be particularly circumscribed (Pet. App. 23a-24a). Neither consideration is present for civil service personnel not employed within the intelligence community.[9] In fact, a different stat-

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where urgency is required. As the court of appeals explained (Pet. App. 20a-21a), however, the CIA's regulations impose no such requirement. In any event, the Director's affidavit indicates that he did "exercis[e] my discretion under the authority granted by section 102(c) * * * and pursuant to HR 20-27m" to discharge an employee "immediately" when the "circumstances of a case * * * make the[] [normal separation] procedures impractical or undesirable" (C.A. App. 45 (quoting regulation)). Doe is incorrect in asserting that the Director did not.

[9] There are other statutes similar to Section 102(c), but they are also limited to employees of other intelligence agencies. 50 U.S.C. 833(a) (National Security Agency); 10 U.S.C. (Supp. III) 1604(e)(1) (Defense Intelligence

ute, 5 U.S.C. 7532, defines the procedures for the separation on national security grounds of such civil service employees, and it provides them with the very procedures that petitioner deems necessary (App., *infra*, 1a-2a).[10] Accordingly, although we believe that the court of appeals' decision will have a serious and damaging effect on the intelligence community, there is no substance to Doe's fear that its ruling will be applied beyond those confines.

Agency); Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 504, 100 Stat. 3198 (civilian intelligence employees or officers of a military department); see 86-1294 Pet. 18-19 & nn.16-17 (reprinting statutes). Moreover, under these statutes the Secretary of Defense may summarily discharge an employee only when the Secretary finds that other procedures cannot be followed consistent with the national security.

[10] In *Department of the Navy* v. *Egan*, petition for cert. pending, No. 86-1552, we have sought review of a decision of the Federal Circuit holding that the Merit Systems Protection Board may, in the course of reviewing the removal of an employee for failing to maintain a required security clearance, review the merits of the agency's underlying decision to revoke a security clearance. (We have provided Doe's counsel with a copy of our petition in *Egan*.) The questions in *Egan* and in this case are quite distinct. In *Egan*, we agree that Egan's removal was subject to review to determine, inter alia, whether he received procedural due process; we contest only the MSPB's right to second guess the clearance determination on the merits. 86-1552 Pet. 19-20. Here, our contention is that another statute specifically bars review of either the merits or the procedures leading to removal. The Federal Circuit in *Egan* specifically recognized that the intelligence agencies, such as the CIA, are governed by their own statutes, which exempt them from the procedural rights applicable to civil service employees generally. *Egan* v. *Department of the Navy*, 802 F.2d 1563, 1567 n.2 (1986).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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Solicitor General

DAVID P. DOHERTY
General Counsel
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APRIL 1987

APPENDIX

5 U.S.C. 7532 provides as follows:

> (a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.
>
> (b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.
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> (c) An employee suspended under subsection (a) of this section who—
>
> (1) has a permanent or indefinite appointment;
>
> (2) has completed his probationary or trial period; and
>
> (3) is a citizen of the United States;
>
> is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

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No. 86-1442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DOE,
Cross-Petitioner

v.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR THE CROSS-PETITIONER

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Dated: May 11, 1987

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REPLY MEMORANDUM FOR THE CROSS-PETITIONER

Cross-petitioner submits this reply memorandum to correct two misstatements in respondent's memorandum in opposition concerning the record below and to address one particularly erroneous mistatement of law.

1. Respondent asserts that Doe is not a tenured employee and that he does not argue to the contrary. (Resp. Mem. at 2-3.) This is not so. Doe successfully completed a year-long probationary period with the CIA. (C.A. App. at 18). For this and other reasons set forth at page 4 of his petition, Doe asserts that he has a property interest in continued employment with the CIA. *See Ashton* v. *Civiletti*, 613 F.2d 923, 929 (D.C. Cir. 1979) (conversion from probationary to non-probationary status creates a property interest protected by the due process clause).

2. Respondent also asserts that Doe never relied on 5 U.S.C. § 555(e) in the courts below. (Resp. Mem. at 7.) To the contrary, Doe specifically argued in his motion for summary judgment that section 555(e) entitles him to a statement of reasons for his termination. (Plaintiff's Memorandum of Points and Authorities in Support of His Motion for Summary Judgment at 22-23.)

3. Respondent's argument that section 555(e) does not apply to termination decisions also requires a brief response. Respondent reasons that since employee selection and tenure decisions are exempt from the formal hearing procedures of 5 U.S.C. § 554, they also are exempt from the requirements of section 555. However, the exceptions to section 554 apply only to that section and not to section 555. *See Roelofs* v. *Secretary of the Air Force*, 628 F.2d 594, 599-600 (D.C. Cir. 1980).

Contrary to the premise underlying respondent's argument, Doe has never claimed entitlement to the formal hearing procedures of section 554. Instead, he has consistently characterized his termination as an informal adjudication that is subject only to the minimal procedures of notice of the reasons for the adverse determination and a meaningful opportunity to respond. Apart from his claims to constitutionally guaranteed due process, Doe contends that these procedures are guaranteed both by general principles of administrative fairness embodied in the Administrative Procedure Act and the specific provisions of section 555(e). *Roelofs* v. *Secretary of the Air Force*, 628 F.2d at 599-600. As the court held there, the fact that an agency proceeding is informal "does not negate the applicability of § 555(e)." *Id.* at 600.

The cases cited at page 8 of respondent's memorandum do not support his contention that section 555(e) does not apply to termination decisions. Two of the cited cases, *Normile* v. *McFague*, 685 F.2d 9 (1st Cir. 1982), and *King* v. *Hampton*, 451 F.2d 247 (8th Cir.), *aff'g* 327 F. Supp. 714 (E.D. Mo. 1971), discuss the exception to the

formal hearing requirements of section 554 for selection and tenure decisions and do not specifically address section 555(e). The court in *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982), citing the section 554 exception, noted that "the APA's hearing procedures do not apply to disputes regarding the tenure of employees." The court did not explain, however, how the section 554 exception applied to a request invoking the informal procedures of section 555(e). Moreover, the court went on to hold that section 555(e) did not apply to that plaintiff's termination because he was employed under a statutory scheme that afforded his employer "unfettered" discretion to fire employees. *Id.* at 1102.[1] The remaining cases cited by respondent simply hold that selection and tenure decisions are not subject to the requirements of section 554, an issue not involved in this case.

For the foregoing reasons and those set forth in the cross-petition, the cross-petition for a writ of certirorari should be granted.

Respectfully submitted,

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Dated: May 11, 1987

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[1] In contrast to section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), the statute at issue in *Bollow* authorized the Federal Reserve Bank to dismiss officers and employees "at pleasure." 12 U.S.C. § 341. *See* 650 F.2d at 1097.